No. 21,625

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

WILLIAM ROSENTHAL, individually and doing business as CAL CLASSIC FURNITURE MANUFACTURING COMPANY, and LYNARD OF CALIFORNIA, INC., a corporation, APPELLEES

Appeal from the United States District Court
For the Central District of California

PETITION FOR REHEARING

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Appellant respectfully petitions for rehearing of this Court's decision, dated December 8, 1967, and, because the issues seriously involve "the public interest in the administration of justice" (see Western Pac. R. Corp. v. Western Pac. R. Co., 206 F.2d 495, 496 (C.A. 9)), suggests that rehearing be en banc, on the following grounds.

1. The effect of the decision cannot be limited to "the particular circumstances of this case", for the issues here involved, and the circumstances in which they were raised, are typical of most enforcement actions under the Fair Labor Standards Act, as well as many other types of cases. Since the decision of this Court is fundamentally

at variance with relevant authorities in other circuits (see decisions discussed in Appellant's main brief, pp. 9-11, 15-17) it will unavoidably have a substantially damaging and unsettling impact upon future litigation in this circuit.

In denying the Secretary's claim that the informer's privilege protected the investigators' reports, as well as employee statements, from discovery, the district court in the instant case patently made no pretense of balancing the public interest in maintaining the privilege against appellees' need to obtain such documents, as required by Roviaro v. United States, 353 U. S. 53, 59, for it gave no consideration to appellees' ability to obtain any needed information by other means. On the contrary, it simply ruled that "the documents which defendants seek to discover are not privileged" (C. T. 91, 112). This ruling obviously is a complete departure from the decisions in other circuits (see our main brief, pp. 15-17), which have uniformly held that the privilege does apply to the names of informants and to investigative reports or statements which would reveal those names. The decisions of other courts of appeals have further held, under circumstances indistinguishable from the instant case, that a balancing of the public interest against the employer's need for such material weighed heavily in favor of non-disclosure.

In affirming the district court's ruling without explanation, it would appear that this Court has sanctioned the view that the informer's privilege is to have no efficacy whatever in this type of action. The absence of any reasoning in this Court's per curiam decision provides an open invitation to unrestrained demands by employer's for such privileged materials simply as a means of obstructing the Act's enforcement. Unless

orrected and clarified now, the decision will require further litigation, ith the attendant risk that in the process of suffering dismissals in rder to obtain appellate review there will be, as there was in the in- tant case, substantial loss to employees of back wages to which they are ntitled.

Equally unsettling to future litigation is the approval given to he district court's conclusion that the "good cause" requirement of Rule 4 was met. Contrary to this Court's opinion, there were absolutely no indings below which would support this conclusion. On the contrary, in he absence of any showing by appellees of need for these documents, it is lear that the district court's order was based simply on the view that be- ause the requested materials had some relevance to the case they must be roduced (see R. T. 4-5, 9-10). In holding this sufficient to meet the good cause" requirement, this Court's decision is plainly contrary to the upreme Court's view of this test in Schlagenhauf v. Holder, 379 U.S. 104, nd the view adopted by the other courts of appeals which have construed it. ee Guilford National Bank of Greensboro v. Southern R. Co., 297 F.2d 921 (C.A.4); Alltmont v. United States, 177 F.2d 971 (C.A.3); Hauger v. Chicago, Rock Island & Pacific Railroad Co., 216 F.2d 501, 508 (C.A.7); and Groover, Christie & Merritt v. LoBianco, 336 F.2d 969 (C.A.D.C.) -- in each of which, even without the additional factor of a claim of privilege, orders for production were reversed because of the failure to show that special circumstances required such production.

2. This Court's affirmance of that portion of the district court's order requiring the production of the Wage-Hour investigators' reports

anctions a wholly unprecedented ruling, [1/] which does not appear to have been fully or specifically considered by this Court.

Such investigative reports typically contain the names of all persons giving information (including those who may have first alerted the Department to an employer's possible violations), as well as summaries of such information and the investigator's comments on the degree of cooperation displayed by each employee and his potential value as a witness. Also included are such matters as the investigator's assessment of the likelihood of the employer's future compliance and his recommendations regarding disposition of the case. Thus, even if there were any justification in this case for ordering the production of statements limited to former employees who were to be called as witnesses -- presumably what this Court had in mind in referring to the "particular circumstances of this case" -- the limitations placed on that portion of the production order were completely vitiated by inclusion of the investigators' reports in the court's order for production. It is evident that those reports would reveal the identity and degree of cooperation of all informants, without distinction between present employees and former employees or those intended to be called as witnesses.

The basis for appellees' demand for inspection of the investigative reports was simply that they would apprise them of the factual basis of the Secretary's case -- a claim that can equally be made by any

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1/ Prior to this case no court has ever ordered a Wage-Hour investigative report to be produced. The reported decisions refusing to order such production include Wirtz v. White, 40 F.R.D. 507 (N.D. Okla. 1965); Mitchell v. Savini, 25 F.R.D. 275 (D.MASS. 1960); Wirtz v. Wheaton Glass Co., 54 Lab. Cases ¶31,829 (D.N.J. 1966); and Walling v. Richmond Screw Anchor Co., 4 F.R.D. 265, 268-269 (E.D.N.Y. 1943).

efendant who has similarly not bothered to utilize such other discovery rocedures as interrogatories, depositions or interviews. This Court's ecision affords no basis for distinguishing future cases when production of nvestigators' reports is sought. As a consequence, unless the decision is orrected, Wage-Hour investigators in this circuit will be unable to give ny assurances of anonymity to potential informants, regardless of how re- oved from subsequent litigation such informants may otherwise be. As ointed out in the affidavit of the Administrator of the Wage and Hour Divi- ion (C.T. 58-59), it has been the Department's experience that employees ither refuse or are reluctant to give information concerning violations nless assurances of confidentiality can be given. The result of this Court's decision, therefore, is to create a formidable obstruction to the enforcement of the Act within this circuit.

Accordingly, we submit, this petition for rehearing should be granted and the district court's order of dismissal reversed. At the very least, the order of dismissal should be reversed on the ground that it was error to order the production of investigators' reports, in which event a remand for reconsideration of the dismissal of the case would be appropriate.

Respectfully submitted.

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JANUARY 1968

CERTIFICATE

I hereby certify that the foregoing petition for rehearing is in my judgment well founded and that it is not filed for the purpose of delay.

BESSIE MARGOLIN,
Associate Solicitor